80-1006

No. . . . .

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

October Term, 1980

JAMES CRAIG, JR., EDWARD BORJA, HENRY COOKS, LEE DOUCETTE, GILBERT HERNANDEZ, NATHAN HOLMES, CLYDE JOHNSON, THOMAS LARK, HENRY REED, MICHAEL RUIZ, VICTOR SALAZAR, SHIRLEY SAMPSON, and WILBUR WEBB, individually and on behalf of all others similarly situated; LOS ANGELES COUNTY BLACK EMPLOYEES ASSOCIATION, a non-profit California corporation; LOS ANGELES COUNTY CHICANO EMPLOYEES ASSOCIATION, a non-profit California corporation; WOMEN IN COUNTY GOVERNMENT, an unincorporated association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, SUPERVISOR ERNEST E. DEBS, SUPERVISOR PETER SCHARBARUM, SUPERVISOR KENNETH HAHN, SUPERVISOR JAMES HAYES, SUPERVISOR BAXTER WARD, CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES, COMMISSIONER RICHARD CAPEN, COMMISSIONER EMMET M. SULLIVAN, and GORDON NESVIG, DIRECTOR OF PERSONNEL, LOS ANGELES COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Whether a written test which operated to exclude Mexican-Americans disproportionately as compared to whites can be found to be legal even though there was *no* validation evidence whatsoever presented in support of the test.

2. Whether an employment practice can be challenged under 42 U.S.C. § 1981 based upon its disparate racial impact without a showing tthat the practice was adopted with the intent to discriminate against a racial minority.

3. Whether a written test which operated to exclude Mexican-Americans disproportionately as compared to whites can be found to be legal when the validation evidence which was submitted *admittedly* did not satisfy "professionally accepted methods."

Parties to the Proceedings in the Court of Appeals.

The only parties to the proceedings in this case before the Court of Appeals for the Ninth Circuit are the parties listed in the caption for this petition.

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COUNTY OF LOS ANGELES, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, SUPERVISOR ERNEST E. DEBS, SUPERVISOR PETER SCHARBARUM, SUPERVISOR KENNETH HAHN, SUPERVISOR JAMES HAYES, SUPERVISOR BAXTER WARD, CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES, COMMISSIONER RICHARD CAPEN, COMMISSIONER EMMET M. SULLIVAN, and GORDON NESVIG, DIRECTOR OF PERSONNEL, LOS ANGELES COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

Opinions and Order Below.

The order of the Ninth Circuit Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is printed as Appendix A.

The opinion of the Ninth Circuit Court of Appeals is printed as Appendix B and is reported as *Craig, et al. v. County of Los Angeles, et al.*, 626 F.2d 659 (9th Cir. 1980).

The memorandum of decision of United States District Court for the Central District of California is printed as Appendix C.

Jurisdiction.

The opinion of the Ninth Circuit Court of Appeals was entered on August 21, 1980.

The order denying the petition for rehearing was filed September 22, 1980.

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1) and to Rule 17.1.

Statutes Involved.

1. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

2. 42 U.S.C. § 1981 which provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and extractions of every kind, and to no other."

Statement of the Case.

This case is a class action brought to remedy alleged unlawful employment discrimination against Mexican-Americans concerning entry-level hiring practices for sworn deputy sheriff positions with the County of Los Angeles. The case was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. (''Title VII'') and pursant to 42 U.S.C. § 1981. Jurisdiction of the United States District Court was invoked pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1443(4).

At trial, plaintiffs/petitioners (''plaintiffs'') established a *prima facie* case of a pattern and practice of discrimination by Defendant County of Los Angeles and its officials (''defendants'') through statistics showing a disparity between the representation of Mexican-Americans in the labor pool and in defendants' work force. Plaintiffs further showed that this pattern of discrimination was the result of defendants' utilization of three discriminatory written tests and a discriminatory height requirement. The statistics showing the severe adverse impact of these hiring practices on Mexican-Americans were stipulated to in the Pre-Trial Conference Order. (R. 20-24.)[1]

Defendants introduced two validation studies which purported to show that two of the three challenged written tests were job-related. No validation studies were introduced in support of defendants' height requirement or its written test used prior to December, 1973.

The District Court found that the plaintiffs had established a statistical *prima facie* case that defendants had engaged

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[1]Throughout this petition, references to the Record on Appeal will be designated by ''R.'' and references to the Reporter's Transcript, by ''R.T.''

in illegally discriminatory employment practices. Nevertheless, the District Court found that the three challenged written tests and the height requirement were not unlawfully discriminatory, basically on the theory that defendants had shown the discriminatory practices to be job-related and also on the ground that one of the tests was not discriminatory in effect. As a result, the District Court entered judgment for defendants.

The Court of Appeals reversed the District Court's finding that the height requirement had been shown to be job-related and the determination that one of the tests was not discriminatory in effect. In its decision, however, without addressing the point, the Court of Appeals affirmed the District Court's determination that one of the three discriminatory written tests was not illegal despite the fact defendants had introduced *no evidence whatsoever* as to the job-relatedness of that discriminatory written test. (*See* Point "I" *infra*.) The Court of Appeals also ruled that before liability is established under 42 U.S.C. § 1981, purposeful intent to discriminate must be proven. (*See* Section "II" *infra*.) Thirdly, concerning the validation evidence that was introduced as to one test, the Court of Appeals rejected virtually all of the plaintiffs' challenges to that validiation evidence despite the *admitted* fact that those validation efforts were *not* done according to professionally accepted methods and did not comport with the "Uniform Guidelines On Employee Selection Procedures," which under the rulings of this Court are entitled to "great deference." (*See* Point "III" *infra*.)

REASONS FOR GRANTING THE WRIT.

I

The Court of Appeals Should Be Summarily Reversed for Holding That a Written Test Was Lawful Despite a Showing of Its Adverse Impact and an Admission of No Validation Evidence.

Supreme Court Rule 17.1(b) provides that one reason a writ of certiorari may be granted is that a court of appeals "has decided a federal question in a way in conflict with applicable decisions of this Court." The first question presented for review on the instant petition involves a blatant departure from Supreme Court precedent established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and reiterated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The *Griggs* and *Albemarle* principle is, of course, that employment practices which are discriminatory in effect must be shown to be job-related or "validated."

Plaintiffs have challenged three different written tests used by the defendant County of Los Angeles: (a) a test entitled the ET4-1 used for several years before December, 1973; (b) a second test also referred to as the ET4-1 used from December, 1973 to January, 1976; and (c) a test entitled the CPS Form 51X used since January, 1976. Defendants introduced validation evidence at trial which purported to establish the job-relatedness of the latter two of these written tests. No evidence whatsoever, however, was introduced in support of the validity of the pre-December 1973 version of the ET4-1.

Indeed, defendants' own personnel officer conceded at trial that the validity studies which had examined the pre-December 1973 test concluded that it was *not* job-related. (R.T. 69.) The same personnel officer admitted that there

were "marked differences" between the content of the pre-December 1973 and the 1973-76 version of the ET4-1 and concluded that the two tests "aren't comparable." (R.T. 64-65.)

The pre-December 1973 version of the ET4-1 had a severe adverse impact. Indeed, the stipulation in the Pre-Trial Conference Order shows that in 1972 only 45.3% of the Mexican-Americans passed the test, compared to 81.2% of the whites. (R. 21.)

Both the District Court and the Court of Appeals in their opinions failed completely to address the admitted fact that the pre-December 1973 version of the ET4-1 written test was not validated. (*See* Appendices B and C.) This is the case despite the fact that the plaintiffs specifically briefed the point to both the District Court (Plaintiffs' Post Trial Brief, pp. 106-109) and the Court of Appeals (Brief of Plaintiffs/Appellants, pp. 40-44). In fact, in the Court of Appeals the point was the initial and major point made in the Petition for Rehearing but in the order denying that petition no explanation was given. (*See* Appendix A.) Under such circumstances, by upholding a discriminatory test despite a complete absence of validation evidence, petitioners respectfully submit that the courts below have "decided a federal question in a way in conflict with applicable decisions of this Court," thereby bringing into play Rule 17.1(b) of this Court.

Petitioners believe that the decision below as to the pre-December 1973 written test is patently erroneous to the extent that a summary reversal could be appropriate. As Stern and Gressman have noted in their text *Supreme Court Practice* (5th ed.), at pages 362-63:

> "The [Supreme] Court may grant a petition for certiorari and at the same time summarily reverse the judgment below or vacate the judgment and remand

the case for further proceedings. Such summary action occurs when the Court, or a majority thereof, is convinced that the decision below is so clearly erroneous as to make oral argument a waste of time. Most commonly this results because the Court believes the case to be clearly controlled by one or more of its own recent decisions." (Citing cases is a footnote.)

Petitioners submit that a summary reversal is particularly necessary in this situation because the decision below directly involves the most basic principle of employment discrimination law. Indeed, if the decision below is allowed to stand, it will mean that the Court below will have been permitted to ignore the *Griggs* tenet that employment practices which are discriminatory in effect must be shown to be job-related.

II

The Supreme Court Has Previously Granted Certiorari on the Issue of the Appropriate Liability Standard Under 42 U.S.C. § 1981; the Same Reasons Compel Review in the Instant Case.

In a case involving the very same employer herein, a writ of certiorari was granted in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) in order to determine the question whether a violation of 42 U.S.C. § 1981 can be based upon a showing of the adverse racial impact of an employment practice without a showing of intent to discriminate. 437 U.S. 903 (1978). The issue was not reached, however, because the lawsuit was found to be moot. *See* 440 U.S. at 631-34. The *identical* question is presented on this petition. It is submitted that the issue remains one of great national importance and should be decided in the instant case for the same reasons certiorari was granted in the prior case.

As specified earlier, the second stage in the validation process requires the defendant to show that the skill or characteristic which the challenged selection device is used to identify or measure is an important element of work behavior comprising or relevant to the job for which applicants are being screened. *Albemarle Paper Co.*, 422 U.S. at 431, 95 S.Ct. at 2378. A specific skill or characteristic is an important element of job or training program performance when a significant portion of the employee or candidate time and energy on the job or in the training program calls for utilization of that skill or characteristic or when its absence would significantly impair the employee's or candidate's effectiveness.

In the instant case, the sheriff's department has shown only that the ET4-1 test correlates with performance on the academic portion of academy training. Specifically, the ET4-1 test measures the applicant's reading, writing and reasoning skills. These skills are considered essential to acceptable performance in such courses as constitutional law, criminal law and procedure, and juvenile law and procedure, which are taught at the sheriff's academy.

The Los Angeles County Sheriff's Department is a large police agency engaged in many aspects of police work. To prepare deputies for the increasingly complex requirements of police work, the department has placed heavy emphasis on law-related academy courses as well as training required in technical areas like telecommunications. We believe that the emphasis is justified in light of the professional and constitutional demands that affect police work.

Given that a significant amount of a new deputy's training in legal areas properly occurs in the classroom, the sheriff has established that some level of verbal and cognitive skills is essential to successful completion of the academy pro-

legally inadequate, although the Court of Appeals did require, as to one point only, that defendants put on additional validation evidence upon a remand.

The first defect in the validation study is that the sample utilized in the study, like the sample in the study in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), did not consist of persons who were a representative cross-section of "real world" applicants, but rather only of persons who had passed the discriminatory test. (*See* Appendix B, pp. 10-12, 626 F.2d at 664-65.) As is most surprising, defendants' own validator actually admitted at trial that due to this sample defect, it was impossible to determine whether the test is job-related. His testimony, at page 279 of the trial transcript is as follows:

> "Q. Is it true that there is nobody in your sample who had never passed the ET4-1?
>
> A. Not exactly.
>
> Q. I said 'never passed.'
>
> A. Oh, yes. That's true.
>
> Q. In other words, everybody in there passed it at least once?
>
> A. That's true
>
> Q. So it was impossible for you to do an analysis to d termine if people who had never passed it would do less well in the training Academy; is that correct?
>
> A. Yes. That's true."

Despite the above-quoted admission and despite the holding in *Albemarle* that the sample in a validation study must be representative of "real" applicants, the Court of Appeals held that the defective sample did not render the validation study legally inadequate. No explanation was given by the Court of Appeals as to how a study with an admittedly defective sample can be legally adequate, other than to attempt to distinguish a prior Ninth Circuit holding on

grounds having nothing to do with adequacy of sample. (*See* Appendix B, p. 11-12; 626 F.2d at 665.)

Just as startling as the sample defect, the basic scheme of defendants' validation study was to attempt to show a relationship between the performance of the persons in the sample upon the discriminatory written test and their subsequent performance on *another written test* administered after they were hired. As with the sample point, most surprisingly, defendants' own validator *admitted* that this was a fatal defect, testifying at trial that there was no way of knowing whether or not the only reason a "relationship" was found in his validation study is that better test takers did better on one test and then better on the other test solely due to being better test takers as opposed to being better employees. His testimony on this point was as follows at pages 278 to 279 of the trial transcript:

> "Q. Now, Mr. Hokama, would you agree that there are some people who are better test-takers than other people?
>
> A. There must be. I think that's probably true.
>
> Q. You would agree with that, wouldn't you, based upon your experiences in the field?
>
> A. Yes.
>
> Q. Now, in this case you were correlating from the ET4-1, which is a written test, to the written tests in the Academy. They were also written tests, weren't they, one written test to another?
>
> A. Yes.
>
> Q. Did you have any controls in your study to determine if the only reason you found these correlations was that good test-takers on the first test were also good test-takers on the second test? Did you have any control in your study for that?
>
> A. No."

The Court of Appeals in its opinion completely ignored this defect that the study had no controls for test taking ability despite the fact the basic scheme of the study was a "test-to-test" strategy.

Another defect in the validation study was that the validator did no analysis to determine whether the discriminatory test had any actual practical value in selecting better employees. Defendants' own expert witness admitted at trial that this was a defect in the validation study. (R.T. 413-16.) The Uniform Guidelines on Employee Selection Procedures, 43 F.R. 38295 (August 25, 1978) mandate at Section 14B(6) that such an analysis be done. The Court of Appeals gave no actual reason for waiving the requirement, stating merely that it did not "understand" the requirement that an analysis for practical significance be done. (*See* Appendix B, p. 13; 626 F.2d at 666.)

Defendant's validation study also failed to carry out an analysis of whether the pass/fail score was appropriate. Similar to the three basic defects described above, the defendants' own expert witness admitted that such an analysis should have been done, even testifying further that he had actually informed the defendants that such a study should have been done. (R.T. 419-20.) The Court of Appeals upheld the study, stating that the analysis of an appropriate pass/fail score had been done when it was specifically admitted by defendants' expert witness that no such analysis had been done. (*See* Appendix B, p. 12; 626 F.2d at 665.)

Plaintiffs wish to emphasize that the decision by the Court of Appeals below in effect completely overrules, in the Ninth Circuit at least, the *Albemarle* holding that validation studies must be done according to "professionally acceptable methods." This is the case because the four admitted basic defects in the validation study, as outlined above, are either ignored or rejected by the Court of Appeals as being

of no consequence. The significance of overruling the *Albemarle* decision cannot be overemphasized — the learning of the case for employers in the Ninth Circuit is that employers can continue to use highly discriminatory selection tests and standards with impunity, thereby maintaining virtually all-white work forces, safe in the knowledge that if sued they can come forward with validation studies, no matter how defectively done, which will "pass muster" in the Courts of this circuit. Plaintiffs respectfully submit that it is crucial not to allow such a situation to continue to exist.

Conclusion.

For the reasons stated above, plaintiffs respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals and that a summary reversal of the first point raised in this petition should be granted.

Respectfully submitted,

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December 22, 1980.

APPENDIX A.

Order.

United States Court of Appeals, for the Ninth Circuit.

James Craig, Jr., et al, Appellants, vs. County of Los Angeles, et al, Appellees. No. 78-1527.

Filed: Sept. 22, 1980.

Before: GOODWIN and WALLACE, Circuit Judges, and FITZGERALD,* District Judge

On August 15, 1980, appellants filed their petition for rehearing and suggestion for rehearing en banc.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

APPENDIX B.

James Craig, Jr., et al., Plaintiffs/Appellants, v. County of Los Angeles et al., Defendants/Appellees. No. 78-1527.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 4, 1979. Decided Aug. 1, 1980. Rehearing Denied Sept. 22, 1980.

Class action was brought on behalf of Mexican-Americans challenging use of two written examinations plus minimum height requirements for employment by county sheriff's department. The United States District Court for the Central District of California, William P. Gray, J., entered judgment dismissing the action, and appeal was taken. The Court of Appeals, Goodwin, Circuit Judge, held that: (1) evidence that 33% of Mexican-Americans who took one test failed while only 13% of whites failed was sufficient to establish prima facie case of discrimination under Title VII; (2) correlation coefficient of .60 between second test given to applicants and performance at police academy was sufficient so that, if correlation were shown between academic performance and performance on the job, test would be valid notwithstanding adverse impact on Mexican-Americans; (3) evidence introduced was inadequate to prove that height restrictions were manifestly related to employment; and (4) proof of intentional discrimination was required in order to sustain claims under Civil Rights Act of 1870.

Affirmed in part, reversed in part and remanded.

Before GOODWIN, and WALLACE, Circuit Judges, and FITZGERALD* District Judge.

GOODWIN, Circuit Judge:

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*The Honorable James Martin Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

After finding that the Mexican-American plaintiffs[1] had proved a prima facie case of discrimination in the use of certain hiring tests for the position of deputy sheriff by Los Angeles County, the district court went on to find that validation of the challenged tests was sufficient to rebut any charge of a violation of federal law. Consequently, the court entered judgment dismissing the action. Plaintiffs appeal. We reverse in part and affirm in part.

This class action challenged the defendants' use of two written examinations plus the minimum height requirements of the sheriff's department as violations of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e, *et seq.*), and the Civil Rights Act of 1870 (42 U.S.C. § 1981).[2]

The trial court considered two written verbal and cognitive ability tests. Statistics demonstrated that the ET4-1 test, administered between 1973 and 1975, had a substantial adverse impact on Mexican-Americans, requiring validation of the test.[3] We will examine the sufficiency of that validation in due course.

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[1]The term "Mexican-American" was defined by the district court as "any person who is 'Spanish-Surnamed' or a 'Spanish Language' person as those terms are utilized by the United States Department of Commerce, Bureau of the Census, in the 1970 Census."

[2]Since Title VII did not become applicable to the sheriff's department, a municipal employer, until 1972, plaintiffs complain that selection devices used between 1970 and 1972 were illegal under the Civil Rights Act of 1870.

[3]Approximately 45% of the Mexican-Americans who took the test failed, while 23% of the whites failed. Similar or less dramatic disparities between failure rates have been found to constitute substantial adverse impact. *See, e.g., Jones v. New York City Human Resources Administration*, 528 F.2d 696, 698 (2nd Cir.), *cert. denied*, 429 U.S. 825, 97 S.Ct. 80, 50 L.Ed.2d 88 (1976), (failure rates ranged from 63% to 85% for Hispanics and 69% to 84% for blacks, compared to 12% to 49% for whites); *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873, 902, 906-07 (C.D.Cal. 1976) (70%, 68.2%, 64.7% failure rates for Mexican-Americans versus 41.9%, 41.4%, 46.3% for whites); *Western Addition Community Organization v. Alioto*, 340 F.Supp. 1351, 1353 (N.D.Cal. 1972) (80% failure rate for blacks, 43% for whites).

The district court did not reach the validation issue for the second test (CPS Form 51X) employed by the sheriff. Based on its finding that 53% of the Mexican-Americans failed the test compared to approximately 50% of the whites, the court concluded that use of that test did not adversely affect Mexican-Americans. The court's finding on impact is clearly erroneous. Stipulated statistics in the record reveal that 33% of the Mexican-Americans who took the 51X test failed while only 13% of the whites failed.[4] This difference is sufficient to establish a prima facie case of discrimination under Title VII. On remand, the defendants will have an opportunity to attempt to validate the CPS Form 51X examination, if they wish to continue to use it.

I. *Validation*

Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to justify the challenged selection device as a business necessity by showing that it is significantly job-related. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1378 (9th Cir. 1979). This process is generally referred to as "validation." *Id.* at 1377. The validation burden compels the employer to show that the preemployment selection device has "a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). The Supreme Court elaborated on the legal standard governing this inquiry as follows:

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[4]The court's finding is clearly inconsistent with the stipulated statistics. The district judge appears to have mistakenly lifted the failure rates for oral interviews instead of those for the 51X test from the same page of the Pretrial Conference Order on which both sets of data appear.

> "[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' 29 CFR § 1607.4(c)." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280 (1975).

The validation process thus involves three distinct steps. The employer must first specify the particular trait or characteristic which the selection device is being used to identify or measure. The employer must then determine that that particular trait or characteristic is an important element of work behavior. Finally, the employer must demonstrate by "professionally acceptable methods" that the selection device is "predictive of or significantly correlated" with the element of work behavior identified in the second step. *Id.*

We turn now to the defendants' attempted validation of the ET4-1 test. The sheriff's department uses this test to determine whether the job applicant is likely to succeed in the required academic training program for the position of deputy sheriff.

The plaintiffs assert that it is not permissible under Title VII to test for predicted performance at the Sheriff's Academy; they would limit the sheriff to testing directly for predicted performance on the job. The law is somewhat ambiguous on this issue. This court has recently suggested by way of a footnote that Title VII does not permit correlation between a selection device and academy performance to substitute for validation of the device vis-a-vis actual job performance. *Blake*, 595 F.2d at 1382-83 n.17. The court there required the defendant police department to demonstrate a significant relationship between the challenged physical abilities test and important aspects of actual job per-

formance as a police officer. The court recognized that one way the defendant might satisfy the requirement would be to show that the selection test correlates with measures of success in training and that those measures in turn are significantly related to job performance.

Prior to *Blake*, the Supreme Court had addressed the question of validation of a preemployment selection test by demonstrating relationship with an academic training program. *Washington v. Davis*, 426 U.S. 229, 249-52, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The Court there approved the defendant police department's use of a verbal abilities test to determine whether applicants possessed the minimum skills necessary to understand and succeed in the academic portion of police officer training. In the circumstances before it, the Court agreed with the "sensible construction of the job-relatedness requirement" advanced by the three-judge district court to the effect that "training-program validation *may* itself be sufficient" to validate a selection device which impacts heavily on a protected group. *Id.* at 250-51, 96 S.Ct. at 2052-2053. (Emphasis added.)

The Supreme Court later summarily affirmed a case which found the validation of national teacher certification examinations against academic teacher training programs, rather than against job performance, sufficient to satisfy the job-relatedness requirement of Title VII. *National Education Ass'n v. South Carolina*, 434 U.S. 1026, 98 S.Ct. 756, 54 L.Ed.2d 775 (1978), *aff'g United States v. South Carolina*, 445 F.Supp. 1094 (D.S.C. 1977).

In neither *Washington v. Davis* nor *National Education Ass'n* does it appear that the Supreme Court considered a potential danger this circuit identified in *Blake*:

> "If employers were permitted to validate selection devices without reference to job performance, then non-job-related selection devices could always be val-

> idated through the simple expedient of employing them at both the pre-training and training stage.'' 596 F.2d at 1382 n.17

The facts in the cases before the Supreme Court suggest that this danger was minimal or nonexistent. The preemployment test in *Washington v. Davis* was '' 'designed to test verbal ability, vocabulary, reading and comprehension,' '' 426 U.S. at 235, 96 S.Ct. at 2045, and was used by the police department to assure that candidates possessed ''some minimal verbal and communicative skill'' necessary to enter the police training program. *Id.* at 250, 96 S.Ct. at 2052. The Supreme Court not unjustifiably assumed that those same skills were relevant to actual job performance. In *National Education Association,* the validation study demonstrated that the certification tests correlated with the content of courses at teacher training institutions in South Carolina. In that situation, there is little danger that both the qualifying test and the academic program would be manipulated to defeat the purposes of Title VII. Academic training, which there precedes the testing, is not in the hands of the immediate employer.

However, the instant case does not demonstrate similar safeguards. Both the selection procedures and the training program are under the control of the employer. And the ET4-1 aptitude test is utilized to measure, not just minimum communication skills, but also cognitive and writing skills.

Thus, we hold that the skill, characteristic or ability which the ET4-1 test purports to measure must be important to the requirements of the job. The sheriff's department may show the requisite relationship by demonstrating that the test correlates significantly with important elements of academy performance *and* that those elements of academy performance are important to actual job performance.

Section 1981 is an extremely important statute in ensuring equal employment opportunities to minorities. Unschooled plaintiffs who fail to comply with the short and confusing statute of limitation period established by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* were assured by the Supreme Court of an independent remedy in *Johnson v. Railway Express, Inc.*, 421 U.S. 454 (1975). Yet a restriction of § 1981 to intentional discrimination, as was done by the court below, deprives the *Johnson* case of most of its significance in a society where most discrimination is subtle in nature and is manifested by its adverse effect on minorities. The Supreme Court was fully aware of this societal reality when, in establishing the adverse effect standard under Title VII, it referred to the fable of the stork and the fox. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

III

The Decision Below Ignored the Settled Legal Principle that Validation Studies Must Be "Professionally Acceptable".

As noted above in the Statement of the Case, for one of the written tests administered after December 1973, defendants actually did submit some validation evidence, in the form of a validation study completed on the eve of trial. As is more fully discussed in the immediately following paragraphs, in both the District Court and the Court of Appeals plaintiffs pointed out numerous basic defects in the validation study. Further, and most surprisingly, as also is more fully described below, defendants' own validator and own expert witness *admitted* that in several respects the validation study was not done in accordance with professionally accepted methods. Despite these numerous admitted defects, the Courts below refused to hold the validation study

gram. What the appropriate level is, however, remains to be demonstrated.

We turn now to a discussion of the final stage of the validation process. The question here is whether the sheriff has demonstrated, by acceptable means, a significant correlation between the ET4-1 test and the important elements of job and academy performance.

The requirements at this stage are twofold: (1) the validation study must use a professionally acceptable method of showing correlation, and (2) the correlation must be "predictive" or "significant". *Albemarle Paper Co.*, 422 U.S. at 431, 95 S.Ct. at 2378.

A number of validation techniques are professionally acceptable. *See Washington v. Davis*, 426 U.S. at 247 n.13, 96 S.Ct. at 2051 (describing three professional methods of validation). The Equal Employment Opportunity Commission ("EEOC") has published guidelines which systematically outline minimum standards for professional validation studies. 29 C.F.R. § 1607 (1975). EEOC guidelines are "entitled to great difference" from courts faced with deciding whether particular employment selection devices comply with Title VII. *Griggs v. Duke Power Co.*, 401 U.S. at 434, 91 S.Ct. at 855. *See also Washington v. Davis, supra*, 426 U.S. at 247 n.13, 96 S.Ct. at 2051. Although compliance with the EEOC guidelines is not mandatory, satisfactory validation of a preemployment selection device may be more difficult to establish when the guidelines have not been followed. *United States v. City of Chicago*, 573 F.2d 416, 426-27 (7th Cir. 1978). In addition, methodological or other defects in validation studies diminish the probative value of the obtained results. *Blake v. City of Los Angeles*, 595 F.2d at 1380-81.

Besides being professionally acceptable, the validation study must demonstrate a significant relation between the challenged selection device or criteria and the important elements of the job or training program, not merely some "rational basis" for the challenged practice. *Washington v. Davis*, 426 U.S. at 247, 96 S.Ct. at 2051. However, the employer need not establish a perfect positive correlation between the selection criteria and the important elements of work.[5]

The ET4-1 validation study offered in this case produced a signifcant correlation coefficient (.60) between the test and academic performance as measured by scores on written examinations given at the end of training. However, plaintiffs enumerate several defects in the sheriff's study which they argue are enough to render the established correlation meaningless.

Plaintiffs first attack the sample utilized in the validation study as unrepresentative of the applicant pool because only persons who received passing scores on the ET4-1 were included in the sample. Plaintiffs note that, as a result, no one really knows whether some who failed the test would nonetheless have successfully completed the training program. In support of this criticism of the validation study, plaintiffs cite EEOC guidelines which state that "[w]here a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question" 29 C.F.R. § 1607.5(b)(1) (1975). Plaintiffs also cite the following lan-

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[5]In the instant situation, a perfect positive correlation would mean that every applicant for deputy sheriff who scored high on the ET4-1 examination also performed well in the academic courses at the sheriff's academy and that every candidate who did poorly in the preemployment test later did poorly at the academy.

guage from *Blake v. City of Los Angeles, supra,* as supportive of their challenge:

> "Appellant's attacks on the methodology of the [validation] studies are more than mere quibbles. Because neither of the studies included persons shorter than 5'6", the studies are of little value in determining whether the height requirement excludes individuals who would be more likely to resort to strong force.[9] [the asserted purpose of the height requirement].
>
> "[9]The EEOC guidelines recognize that validation studies should include persons who are excluded by the selection standards in question. (*See* 29 C.F.R. § 1607.5)" 595 F.2d at 1380.

. . . . .

We agree with the *Blake* construction of the cited EEOC guidelines. *See also United States v. Georgia Pacific Co.*, 474 F.2d 906, 915-16 (5th Cir. 1973). And, as we earlier noted, noncompliance with the EEOC guidelines diminishes the probative value of the defendants' validation study. But it is not necessarily fatal.

The sheriff's department demonstrated a very high correlation between scores on the ET4-1 test and academic averages at the academy. Plaintiffs point to no data which are inconsistent with defendants' validation study. Nor do they cite serious flaws in the study's data-gathering or handling which might warrant the suspicion that the obtained correlation is spurious or erroneous.

In contrast, the *Blake* plaintiffs raised a host of methodological criticisms of the defendants' validation studies, including ambiguous definitions of the crucial variable, potential coder bias, and lack of control for experience. In addition, they alleged that other research as well as one of the defendants' own studies resulted in some data directly contrary to the defendants' position. Plaintiffs' showing in

that case clearly entitled them to reversal of the summary judgment entered against them.

Under the circumstances here, however, the demonstrated correlation is sufficiently strong to support the inference drawn by the district court after trial that persons excluded from the academy, and thus from the sample, because they failed the ET4-1 entrance exam would not have succeeded in the academic training program. We perceive no reason at this point to require the sheriff's department to hire and train a sample of failing applicants, with the attendant expense to the county and potential unfairness to the candidates so hired, in order to provide statisticians with more certain results.

The plaintiffs also contend that the sheriff's department failed to validate the passing score cutoff for ET4-1. The EEOC guidelines do not require separate validation of passing scores. They do require that the cutoff be "reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted." 29 C.F.R. § 1607.6 (1975). The sheriff's department complied with this requirement. The evidence indicated that those candidates who barely passed the ET4-1 examination performed correspondingly in the academic classes at the academy. A lower passing score would have resulted in the admission of a number of applicants who would not have been able to perform acceptably in the academy.

Plaintiffs have presented no evidence indicating that the cutoff score was set arbitrarily. Nor was it so high as to maximize adverse impact on Mexican-Americans. While a lower passing score would have increased their rate of passing, 55 percent of all Mexican-Americans taking the test between 1971 and 1975 were in fact able to achieve the passing score or higher. Thus, the cutoff level appears to

us to have been reasonable and consistent with normal expectations of performance in the academic training program.

Plaintiffs next complain that the ET4-1 test was not shown to correlate with other important elements of sheriff's academy performance such as leadership ability, ability to get along with other trainees, and practical application of academic knowledge. The plaintiffs misconstrue an employer's obligation under Title VII. The sheriff's department must establish that the challenged selection device is a strong predictor of or is significantly correlated to important elements of work or academy performance. It is not compelled to demonstrate a significant correlation to *all* elements of work or training. Once the sheriff's department showed that success on the ET4-1 examination correlated significantly with academic performance, then it has satisfied that part of its burden.

Plaintiffs finally attempt to discredit the defendants' validation study by pointing out the lack of analysis of the ET4-1 test for "practical significance." We fail to understand how this criticism differs significantly from the last one considered and thus find it to be equally without merit.

Thus, as to the ET4-1 examination, we remand solely to allow defendants the opportunity to demonstrate the second link in the validation chain. That is, they must now show that the level of academic training given to new recruits manifestly relates to the knowledge that deputy sheriffs must possess to perform the job successfully. We assume that that level lies somewhere above the understanding of the ordinary layperson yet well below that required of an effective legal advocate or criminal law scholar. But an assumption is not an acceptable substitute for evidence of validity. *See* 29 C.F.R. § 1607.8 (1975). As part of the requisite showing on remand, defendants must also establish that the after-training examinations, with which the ET4-1

test has already been shown to correlate, fairly measure the trainees' mastery of the subject matter taught in the academic program.

We turn now to the height requirements for deputy sheriffs which the defendants concede had a significant adverse impact upon Mexican-American applicants of both sexes.[6] Although the district court correctly treated the impact as sufficient to make out plaintiffs' prima facie case, and also noted that the mere existence of the minimum height rule deterred substantial numbers of otherwise potentially qualified Mexican-Americans from applying, the court concluded ultimately that the height requirements were sufficiently job-related to withstand all challenges, and denied relief. In making this ruling in 1977, the court did not have the benefit of this court's instructive decision in *Blake v. City of Los Angeles, supra,* which reversed a summary judgment for the Los Angeles Police Department and remanded for trial the question of validating a minimum height requirement that disproportionately excluded women from the police force.

In the case at bar, the district court did take testimony on the validation of the height requirements, and found that they passed scrutiny under Title VII standards. However, the court failed to apply the rigorous standards of job-relatedness that Title VII demands under the rulings of the Supreme Court and of this circuit.

Recognizing that no professional validation studies had been attempted, the district court further opined that no professionally accepted validation method could demon-

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[6]The height requirements in effect until May 1975 (67 inches for males and 63 inches for females) had the effect of eliminating 41% of the Mexican-American males (compared to 14% of all other males) and 74% of the Mexican-American females (compared to 50% of the other females) from further consideration for employment.

strate that minimum height requirements are job-related. Then, relying upon a concurring opinion in *Dothard v. Rawlinson*, 433 U.S. 321, 337, 97 S.Ct. 2720, 2730, 53 L.Ed.2d 786 (1977) (a prison guard case),[7] the court accepted the conventional belief of police officers, which the court found to be based upon work experience and common sense, that "size is important in discouraging violence."

As noted earlier, validation of a selection device under Title VII consists of three steps. The first requires the employer to articulate the skill, characteristic or ability which the device is used to identify or measure. Here, the sheriff's department believed that large body size or stature was related to the ability of deputy sheriffs to command respect and to apply physical restraints when necessary in the control aspects of the job.

In the second step, the employer must demonstrate that the abilities identified in step one are important to job performance. In determining whether deputy sheriffs spend a significant portion of their time engaging in control functions, or whether some inability to "command respect" from or to physically control others would detract from effective job performance, the sheriff's department cannot rely on generalizations about police "experience." As the department's own counsel argued in support of educational testing, police work has become very complex, demanding a multitude of skills and a depth of background.

One generalization on which the sheriff would have us rely is that all police officers expend a significant portion of their time and effort in confrontation and control con-

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[7]Concurring in *Dothard*, Justice Rehnquist suggested that "the *appearance* of strength" was a qualification for prison guards justifying minimum height and weight requirements despite their adverse impact on women. 433 U.S. at 339-40, 97 S.Ct. at 2731-32.

ditions. This is problematical. No study proved the generalization to be a fact.

The role of a police officer in the community is not the same as that of a prison guard. Although police officers may be compelled to appear credible in crowd dispersal, breaking up fights, and similar functions, officers must also be able to communicate with their constituency, relate to the person on the street, and apply a variety of skills in a variety of exigencies.

While we are inclined to accept the notion that the appearance of strength and the ability to command respect or obtain psychological advantage in a confrontation situation are important elements of some police work, the record does not support acceptance of the generalization that physical size is important in all police positions. Police work may have many functions. One might deal with juvenile or domestic problems, while another specializes in foot or mounted patrol work. A third might engage solely in undercover or investigatory activities. Still another might be limited to education or community relations work.

Even were we to assume that the "control function" identified by the sheriff's department is important to the effective performance of every deputy, the department has not demonstrated by professionally acceptable methods that the height requirements were predictive of or significantly correlated to that element of job performance.

In the trial of this case, the sheriff and a physical training instructor each testified that height was "extremely important" in the control functions of a deputy sheriff, particularly in commanding respect and in applying physical restraint. The record, however, is devoid of any basis for these opinions. Alone, they are clearly insufficient to satisfy the re-

quirements of validation as set out in *Albemarle Paper Co., Dothard,* and *Blake.*[8]

Besides failing to offer any validation evidence demonstrating the asserted relationship between height and the ability to apply physical restraint, the sheriff's department has not explained why that ability cannot be measured directly. The relationship with height is neither clear nor direct, and use of that criterion has a devastating effect on Mexican-Americans, many of whom may well be capable of subduing larger persons. We agree with the suggestion concurred in by a majority of the Supreme Court in *Dothard v. Rawlinson, supra:*

> "If the job-related quality [physical strength] . . . is bona fide, [the employer's] purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that 'measure[s] the person for the job and not the person in the abstract.' *Griggs v. Duke Power Co.,* 401 U.S., at 436 [91 S.Ct. 849]." 433 U.S. at 332, 97 S.Ct. at 2728 (Footnote omitted.)

The second proffered justification for the height requirement, that it gives the deputy a psychological advantage in confrontation situations, is equally unconvincing. We note that Los Angeles County is a metropolitan area with a large Mexican-American community. The county's demography makes it inevitable that a substantial amount of deputy-sheriff time will be spent in that community. The department's argument in effect ignores the respect likely to be

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[8]Mere opinion testimony by sheriff's department personnel that height is effective in control functions is inadequate to establish the significant correlation that is required under Title VII. *Cf. United States v. Virginia,* 454 F.Supp. 1077, 1088 (E.D.Va.1978) (opinion evidence that "height and weight are useful in police work" does not prove job-relatedness, but rather only "a good faith belief of job-relatedness.")

given by that community to Mexican-American deputies, however, small in stature, by virtue of their shared language and culture.

Even in a direct confrontation situation, the sheriff's department has presented no data supporting its contention that assailants are more likely to attack deputies shorter than 67 inches (63 inches for women) than those who are taller. That a hypothesis positing such a relationship may not seem unreasonable is insufficient to satisfy the employer's burden of proving job-relatedness. *See Washington v. Davis*, 426 U.S. at 246-47, 96 S.Ct. at 2050-51.

While we do not suggest that height restrictions can never be verified, the evidence introduced in this case was inadequate to prove that the height restrictions were manifestly related to employment by the sheriff's department. The district court's finding of job-relatedness must be reversed.

II. § *1981 Claim*

Because the case must be remanded for other reasons, we will consider briefly the plaintiffs' argument that they are entitled to relief under 42 U.S.C. § 1981.

Plaintiffs claim that the sheriff's department is liable for employment discrimination under 42 U.S.C. § 1981, for the challenged employment practices occurring between March 12, 1970 and March 24, 1972, prior to the applicability of Title VII to public employers. Plaintiffs concede that they cannot prove intentional discrimination but argue that employment discrimination claims under § 1981, like Title VII claims, do not require such proof. This is not the law.

The parties recognize that this circuit lacks controlling precedent on the precise issue presented here.[9] However, the historical connection between § 1981 and the Fourteenth Amendment, the thrust of the Supreme Court decision in *Washington v. Davis, supra,* the complexity as well as legislative history of the statutory scheme adopted by Congress in Title VII, and the ease with which acceptance of plaintiffs' theory would allow circumvention of that scheme convince us that equal protection rather than Title VII standards apply to employment discrimination claims brought under § 1981.[10] Thus, we affirm that part of the judgment denying relief under § 1981.

Affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion.

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[9]This court decided the § 1981 issue in favor of the plaintiffs' position, over a strong dissent, in *Davis v. County of Los Angeles,* 566 F.2d 1334 (9th Cir. 1977). However, because the Supreme Court subsequently vacated the decision on the ground of mootness, *County of Los Angeles v. Davis,* 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), it is no longer binding upon us.

[10]We are not alone in this conclusion. *See, e.g., Mescall v. Burrus,* 603 F.2d 1266, 1270-71 (7th Cir. 1979); *Williams v. DeKalb County,* 582 F.2d 2 (5th Cir. 1978); *Johnson v. Alexander,* 572 F.2d 1219 (8th Cir.), *cert. denied,* 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978); *Chicano Police Officer's Ass'n v. Stover,* 552 F.2d 918 (10th Cir. 1977); Note, *Davis v. Los Angeles: Plaintiff's Burden of Proof Under Section 1981,* 9 Golden Gate U.L.Rev. 1, 19-20 (1978-1979); *But see* Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?,* 80 Colum.L.Rev. 137 (1980).

APPENDIX C.

Memorandum of Decision.

United States District Court Central District of California.

James Craig, Jr., et al., Plaintiffs, vs. County of Los Angeles, et al., Defendants. Civil No. 73-521-WPG.

FILED: Sept. 30, 1977.

Since the post-trial oral argument, on August 22, 1977, I have restudied the post-trial briefs, the Pre-trial Conference Order, the notes that I took in the course of the trial, and the *Albemarale* and *Washington v. Davis* decisions, and I have read the *Dothard* decision and the transcript of the August 22 proceedings.

Reference is made to paragraph VIII of the Pre-trial Conference Order in this case, filed April 12, 1976. It is my intention now to render a decision by undertaking to refer to and decide the issues of fact and law listed in that paragraph. In light of the thorough discussion in the briefs and our extensive oral interchanges in the course of the hearings, my comments here will be somewhat concise and "telegraphic."

Issue A. A *prima facie* case of illegal discriminatory employment practices between the years 1972 and 1975, inclusive, has been established. This conclusion is based upon the following responses to the numbered subissues:

1. The court considers the appropriate comparison to be the Mexican-American proportion of the civilian labor force, as modified by the following subparagraphs. The initial figure used is the 1970 census figure of 15.9%.

2. The listed additional factors proposed by the plaintiffs in this subparagraph have been considered and would, of course, tend to increase the percentage figure of the available Mexican-Americans.

3. Offsetting factors tending to diminish the proportionate number of Mexican-Americans available as potential deputy sheriffs are the following:

(a) The five foot seven inch requirement in effect prior to May 1975 (see later discussion).

(b) The high school diploma (or equivalent) requirement. I have considerable doubt that the demographer took adequately into account the factor of school "drop-outs" as between Mexican-Americans and Caucasians.

(c) The fact that English is not the native tongue or the familial tongue of large numbers of Mexican-Americans necessarily imposes a handicap upon the ability of those young people to develop fluency in our national language. It may very well be that most of the young people with a Latin heritage do very well by the time they become high school seniors, but I am unable to accept the plaintiffs' showing that the effect of the language factor is minimal.

(d) It is well known, and the court takes judicial notice, that many Mexican-American residents are here illegally and would be reluctant to "surface" to the extent of applying for employment by the Sheriff. I was not impressed with the sufficiency with which the plaintiffs' expert witness took this factor into account.

It is very difficult to evaluate the extent to which the factors listed in this subparagraph 3 affect the potential work force, and the same is true with respect to the factors referred to in subparagraph 2. It does seem to me, however, that they tend to offset each other, and accordingly the initial figure of 15.9% remains effective. Inasmuch as Mexican-Americans comprise not more than 7.4% of the sworn personnel for the Sheriff's Department as of February 1976 (Pre-trial Order, page 7, line 18), the *prima facie* discrimination is established.

Issue B. (No longer an issue).

Issue C. The ET4-1 written test is found to have been sufficiently job related under the circumstances here concerned.

1. The validation study was not done so thoroughly or carefully as to render it immune from attack by the plaintiffs; and its results did not show the test to be a model means of evaluating the potentiality of applicants. But the study did show a high correlation between the test and the ability of the applicant to handle the academic work.

2. A threshold determination of ability to do the academic work is important to the Sheriff, in light of the expense involved in providing academy training to the applicant.

3. It is true that the ability to do the academic work is determined in part by faculty evaluation. But this does not remove the appropriateness of the alternative or supplemental means of assessment through written examination. As Justice White said in *Washington v. Davis*, 426 U.S. 229, 250 (1976), it is understandable ". . . that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen."

4. The plaintiffs contend that the validation study established principally a relationship between success in the ET4-1 examination and "test taking ability." To the extent that this is so, it provides a factor tending to give further validity to the test. "Test taking ability" includes the attributes of being able to write legibly, intelligibly and logically, qualities that are particularly important in a deputy sheriff, who spends much of his time writing reports or citations of one form or another. If a candidate is deficient

in these qualities, it is well to find it out before the expensive training program begins.

5. The fact that the Sheriff and his staff have established a good faith desire to recruit and "bring aboard" Mexican-Americans is at least a "make weight" toward a decision upholding the validity of the test. I am aware that good faith is not a defense in a Title VII action if a discriminatory hiring practice is not job related. But the good faith shown here tends to dissipate the skepticism with which I would otherwise examine a test in order to detect a cynical and unjustified attempt to disqualify.

6. The fact that the test is no longer in use also reduces somewhat the need to be critical of it and of the evaluation study.

Issue D. This court is unable to conclude that the 51X written test violates Title VII or 42 U.S.C. §§ 1981 or 1983. It was given only once, and the percentage of Mexican-Americans that failed the test in relation to those taking it (53%) was only three percent greater than the proportionate number of "whites" that failed. Such disparity is not sufficient to warrant a finding of discrimination.

Issue E. It is the conclusion of this court that the 5'7" height requirement did not violate Title VII or 42 U.S.C. §§ 1981 or 1983. I am mindful that this requirement did discriminate substantially against Mexican-Americans and that the Sheriff's staff concluded that it could not come up with a validation study that would establish job relatedness. This conclusion apparently stemmed largely from the fact that the studies available to them failed to show any correlation between the numbers of actual assaults on deputies and the heights of the deputies involved (see Exhibits 39, 46 and 48). Of course, the available studies also necessarily lacked information as to the numbers of times that a potential

assailant was deterred by the size of the contemplated victim. I do not see how a validation study could be expected to assess adequately the psychological advantage that a large deputy sheriff would have. But the record shows that the Sheriff and his colleagues honestly believe that the factor of size is important in discouraging violence. Such opinions are based upon many years of experience in law enforcement and seem to me to be fully in accord with common sense. I cannot believe that the validity of the age old admonition to "pick on somebody your own size" was repealed by Title VII.

The Sheriff chose a 5'7" height requirement in order to have deputies that are reasonably large in size with the goal in mind of reducing the likelihood of violence involving them. This was done in the interests of security and despite the fact that it would have an undesired effect upon the eligibility for recruitment of certain racial minorities. In light of the responsibilities imposed upon the Sheriff, I think that such decision should be upheld and that nothing in the law precludes it (see the concurring opinion of Justice Renquist in *Dothard v. Rawlinson*, ... U.S. ...., 45 L.W. 4888 (June 27, 1977)).

Isssue F. Violations of Title VII and of 42 U.S.C. §§ 1981 and 1983 not having been established, no relief will be accorded the plaintiffs, and a judgment will be filed contemporaneously herewith dismissing the action. Each side will bear its own costs and attorney's fees.

This memorandum shall constitute the findings of fact and conclusions of law, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

DATED: September 30, 1977.

/s/William P. Gray
WILLIAM P. GRAY
United States District Judge.

No. 80-1006

IN THE

Supreme Court of the United States

October Term, 1980

JAMES CRAIG, JR., EDWARD BORJA, HENRY COOKS, LEE DOUCETTE, GILBERT HERNANDEZ, NATHAN HOLMES, CLYDE JOHNSON, THOMAS LARK, HENRY REED, MICHAEL RUIZ, VICTOR SALAZAR, SHIRLEY SAMPSON, and WILBUR WEBB, individually and on behalf of all others similarly situated; LOS ANGELES COUNTY BLACK EMPLOYEES ASSOCIATION, a non-profit California corporation; LOS ANGELES COUNTY CHICANO EMPLOYEES ASSOCIATION, a non-profit California corporation; WOMEN IN COUNTY GOVERNMENT, an unincorporated association,

Petitioners.

vs.

COUNTY OF LOS ANGELES, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, SUPERVISOR ERNEST E. DEBS, SUPERVISOR PETER SCHARBARUM, SUPERVISOR KENNETH HAHN, SUPERVISOR JAMES HAYES, SUPERVISOR BAXTER WARD, CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES, COMMISSIONER RICHARD CAPEN, COMMISSIONER EMMET M. SULLIVAN, and GORDON NESVIG, DIRECTOR OF PERSONNEL, LOS ANGELES COUNTY,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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No. 80-1006

IN THE

Supreme Court of the United States

October Term, 1980

JAMES CRAIG, JR., EDWARD BORJA, HENRY COOKS, LEE DOUCETTE, GILBERT HERNANDEZ, NATHAN HOLMES, CLYDE JOHNSON, THOMAS LARK, HENRY REED, MICHAEL RUIZ, VICTOR SALAZAR, SHIRLEY SAMPSON, and WILBUR WEBB, individually and on behalf of all others similarly situated; LOS ANGELES COUNTY BLACK EMPLOYEES ASSOCIATION, a non-profit California corporation; LOS ANGELES COUNTY CHICANO EMPLOYEES ASSOCIATION, a non-profit California corporation; WOMEN IN COUNTY GOVERNMENT, an unincorporated association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, SUPERVISOR ERNEST E. DEBS, SUPERVISOR PETER SCHARBARUM, SUPERVISOR KENNETH HAHN, SUPERVISOR JAMES HAYES, SUPERVISOR BAXTER WARD, CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES, COMMISSIONER RICHARD CAPEN, COMMISSIONER EMMET M. SULLIVAN, and GORDON NESVIG, DIRECTOR OF PERSONNEL, LOS ANGELES COUNTY,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondents, County of Los Angeles, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 626 F.2d 659 (1980).

Statement of the Case.

The petitioners' sparse recitation of the facts of the case are amplified as follows to set the issues in their complete factual context.

On behalf of a class of Mexican-Americans, the petitioners brought this action under 43 USC § 1981 and Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, *et seq.*). Title VII governed employment practices implemented after March, 1972 while § 1981 pertained to those occurring earlier. The actionable period under the latter statute commenced March 12, 1970, three years prior to the filing of the complaint.

The testing validation issues revolve around three forms of a written pre-employment test administered by the County of Los Angeles within the actionable period. The first was a test utilized by the County for some years prior to March, 1972, the effective date of Title VII as to governmental entities, and used until December of 1973. The second test, designated ET4-1, was administered from December of 1973 through November of 1975. This test replaced the earlier test and was a revision made as a consequence of the job relatedness requirements of Title VII. The third test was a commercially purchased examination (CPX-51X) that was administered for one time only in January, 1976. Only the first two tests involve issues presented in the petition for writ of certiorari.

All forms of the test were used on a pass/fail basis with only passing individuals eligible to advance to subsequent phases of the examination process.[1] The written examination

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[1]The written qualification test was the initial but not the only hiring criteria. There was no adverse impact in the administration of the other portions of the employment process (oral interview, physical examination, physical agility test, and background check) and these were not challenged in the lawsuit.

was unweighted and all the passing applicants were unranked when they proceeded to the oral interview phase. The results of the oral interview established the applicant's ultimate rank on the eligibility list. During the period 1972 through 1975, 69.6% of all applicants taking the test passed. 55.1% of the Mexican-Americans taking the test passed during the same period. (R. 21).[2]

After the effective date of Title VII, the County undertook a study of its test administration with the object of revising their test to reduce adverse impact, and to validate it in accordance with Title VII standards. For an eight-month period, from March of 1972 to December of 1972, the County continued to administer its traditional test without change. There was an adverse impact on Mexican-Americans during that period.

Requiring more time to revise and validate their tests, the County continued to use the old test throughout 1973 but in such a way that there was no adverse impact on any minorities. During 1973 until the new test form went into effect in December, 85% of all Mexican-Americans taking the test passed and advanced to other portions of the examination process.

In December of 1973, the County introduced a new revised form of the test and utilized it until November of 1975. The revised test differed from the earlier version in several respects. Certain sections, primarily the arithmetical computation portion, were eliminated and a clerical perception section added. (R.T. p. 96, line 24). The revisions resulted in a higher Mexican-American passing percentage

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[2]Throughout this opposition, references to the Record on Appeal will be designated by "R.", references to the Reporter's Transcript by "R.T." and to the Appendices in the Petition by "App."

(58.5%) than heretofore had been the case by almost 10 percentage points.

The County's validation study and trial evidence was directed toward the new revised form of the ET4-1, first utilized in December, 1973, — the County taking the position that the temporary interim use of the old test during the transition period immediately following the effective date of Title VII did not violate that statute. With regard to the revised test, the respondents, through the testimony of an industrial psychologist, established the job relatedness of the test by a Concurrent Criterion Related Validation Study which demonstrated to a very high degree of statistical accuracy that the ET4-1 pre-employment test was highly correlated with, and predictive of academic performance in the post-employment training academy.[3]

The respondents' validation study demonstrated that there was a very high correlation between the applicant's score on the pre-employment aptitude test and his score (academic grade point average) in the academic curriculum of the training academy. The correlation coefficient was .60 and statistically significant at the highest level of confidence (.01). The validation study conducted by the County was done by Dennis Hokama, Personnel Analyst, under the supervision of two Ph.D's in Industrial Psychology, Dr. Coleman and Dr. Ford (R.T. p. 250). Dr. Coleman, familiar with the American Psychological Association standards and the federal guidelines testified that the study which he supervised

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[3]The academic portion of academy training included courses in constitutional law, the law of arrest, search and seizure, criminal law and the rules of evidence, among others. The complete academic curriculum was included as part of the validation study.

and reviewed throughout was properly conducted and was a sound study. (R.T. p. 380).

During the trial, the petitioners conceded that it was appropriate to correlate a qualification test with subsequent training academy performance (R.T. p. 406, lines 8-17), but raised certain objections to the methods of the study. The petitioners' principal claims of methodological defect, subsequently rejected by the Ninth Circuit, and raised in the petition herein were:

1. The study sample was legally defective because the County did not hire individuals who failed the test in order to validate it. They claimed that the only legal method of validation required a pure predictive criterion study and a concurrent criterion study was insufficient.
2. Despite a correlation coefficient of .60, the test had no practical significance.
3. The County made no analysis of the cut-off score.

The petitioners did not claim in the trial court or on appeal that the alleged defects went to the weight to be accorded the respondents' validation study and the trial court's finding was clearly erroneous. Instead, the petitioners urged as they do in the petition herein that the alleged defects rendered the validation study inadequate as a matter of law.

REASONS FOR DENYING THE PETITION.

The reasons this Court should refuse to grant the Petition for Writ of Certiorari are as follows:

1. The Court of Appeals correctly held that purposeful discrimination must be proved under § 1981:

a. The ruling is consistent with well-established principles of statutory construction; Equal protection rather than Title VII standards apply to employment discrimination claims brought under § 1981.

b. All Circuits which have addressed the § 1981 issue are now in accord in holding that intent is a requirement for cause of action under that statute.

2. The Respondents did not violate Title VII by their use of a written test having adverse impact for a temporary interim period of 8 months immediately following the effective date of Title VII.

3. Trial and Appellate Court rulings on the methods of test validation were not clearly erroneous; The holdings are consistent with other decisions and the EEOC Guidelines, turn on the particular facts of the case, and do not raise issues of a significant nature that would justify review by this Court.

ARGUMENT.

I.

The Circuit Court's Holding That Discriminatory Intent Is Required Under 42 USC § 1981 Is Correct and in Conformity With the Holdings in All Other Circuits.

1. The situation has changed substantially since this Court granted a hearing on this issue in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979).

The posture of the parties in the context in which the issue is raised is entirely different. In the case at bar, the respondents prevailed, the Ninth Circuit agreeing with their position that intent is a necessary requirement for a cause of action under § 1981. The situation was the reverse at the time the Court granted certiorari in *County of Los Angeles v. Davis*. The Ninth Circuit in the *Davis* case held contrary to the weight of existing authority that intent was not a necessary requirement under § 1981 and that Title VII standards were equally applicable to causes of action brought under the Civil Rights Acts of 1866 and 1870.

The Courts of Appeal of all of the circuits except the Fourth, which has yet to consider the issue, have now held that purposeful discriminatory intent is required to prove a cause of action under Sec. 1981. Numerous district courts have reached the same conclusion.[4]

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[4] *1st Circuit - Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 15-16 (1979).

2nd Circuit - Guardians Assn. v. Civil Service Commission, ... F.2d .... (1980), 23 FEP Cases 677, 700.

3rd Circuit - Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 140 (3rd Cir. 1977) implying that burdens of proof under § 1981 are the same as under the Constitution, cert. den. 98 S.Ct. 1451 (1978).

(footnote continued on following page)

The Ninth Circuit's ruling on intent was correct. Uniformly, since this Court's decision in *County of Los Angeles v. Davis*, the courts below have all held that intent is required. The most recent appellate court to consider this question was the Second Circuit in *Guardians Association v. Civil Service Commission*, ... F.2d ...., 23 FEP Cases 677 (1980). The Second Circuit in finding that discrimi-

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5th Circuit - Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978); *Grisby v. North Mississippi Medical Center*, 586 F.2d 457, 614 F.2d 1300, 1309 (1980).

6th Circuit - Arnold v. Ballard, 12 EPD para. 11,224 (1976). See subsequent district court opinion holding that under *Washington v. Davis* purposeful intent is required for § 1981 and expressly declining to follow the 9th Circuit's now vacated decision in *Van Davis v. County of Los Angeles. Arnold v. Ballard*, 448 F.Supp. 1025 (1978); *Detroit Police Officers Assn v. Young*, 608 F.2d 671, 692 (1979).

7th Circuit - Mescall v. Burrus, 603 F.2d 1266; *United States v. City of Chicago*, 549 F.2d 415 (1977); *City of Milwaukee v. Saxbe*, 546 F.2d 693, 705 (1976) (burden of § 1981 cases is the same as the Constitutional burden under the Fifth Amendment).

8th Circuit - Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978) (Sec. 1981 involves different standards of proof than Title VII); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978). Sec. 1981 claim follows constitutional rather than Title VII evidentiary standards.

9th Circuit - Craig, et al. v. County of Los Angeles, et al., 626 F.2d 659 (1980).

10th Circuit - Chicago Police Officers Association v. Stover, 552 F.2d 918 (10th Cir. 1977).

District Courts - Harris v. White, 479 F.Supp 996, 1002 (1979) (citing the First Circuit in *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 15 (1979).

District Courts - Arnold v. Ballard, 448 F.Supp. 1025 (1978); *Rich v. Martin Marietta Corp.*, 467 F.Supp. 587, 617 (1979); *Lewis v. Bethlehem Steel Corp.*, 440 F.Supp. 949, 963 (1977); *United States v. State of So. Carolina*, ... F.Supp. ...., 15 FEP Cases 1196 (1977) (3-judge panel that included two circuit judges); *Crocker v. Boeing Co.*, 437 F.Supp. 1138 (1977); *Dickerson v. U.S. Steel Corp.*, ... F.Supp. ...., 15 FEP Cases 753 (1977); *Velzaga v. National Board of Respiratory Therapy*, 13 FEP para. 11,525, 8875, 8881 (N.D. Ill., January 27, 1977).

natory intent must be proven in actions brought under § 1981, made an exhaustive analysis of the issue and the earlier decisions. Emphasizing that the court's inquiry must focus upon the congressional intent at the time Congress enacted § 1981, the Second Circuit, after such analysis concluded, "the language structure and history of § 1981 all point to the conclusion that the statute was simply intended to prohibit purposeful racial discrimination in a wide variety of circumstances, including but not limited to employment discrimination. While § 1981 and Title VII overlapped to a certain degree, the two statutes differ in many ways including the fact that Title VII is concerned exclusively with employment discrimination whereas § 1981 is addressed to a wide variety of rights. Moreover, Title VII establishes an elaborate administrative enforcement mechanism that conditions the right to judicial relief on the exhaustion thereof. Section 1981 on the other hand does not have its own limitation." *Supra* at 703.

The decision in the case at bar brought the Ninth Circuit in accord with all other circuits that have ruled on this issue. Section 1981 was enacted as an equal protection statute designed to enforce the constitutional rights and whose standards of liability track constitutional principles, not those of Title VII. The 39th Congress at the time of the enactment of § 1981 could not have intended that Title VII adverse impact and test validation standards, creations of twentieth century testing methodology and the Civil Rights Act of 1964, could have pertained to actions brought under the Reconstruction Era civil rights acts.

The Ninth Circuit in holding that intent is required has harmonized the proof requirements for causes of action under the Federal Civil Rights Acts of 1866, 1870, 1871 and the U.S. Constitution. Recognizing an intent requirement for actions brought under § 1981 is compatible with this Court's holding in *Washington v. Davis* and the Courts'

recognition of different liability standards for employment practices occurring before and after the effective date of Title VII. To transpose the adverse impact standards originally articulated by this Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971), a Title VII case, to § 1981 actions would obliterate any distinction between those two statutes and in effect would impose liability on employers for hiring practices without any discriminatory intent that occurred prior to the effective date of Title VII. Perhaps most significantly, the transposition of Title VII standards to § 1981 actions would frustrate the comprehensive congressional scheme embodied in Title VII which includes jurisdictional filing prequisites, statutes of limitations, and mandatory requirements for reconciliation and administrative review.

In its brief in *County of Los Angeles v. Davis*, this respondent noted the substantial threat to Title VII's comprehensive statutory scheme if Title VII standards were made applicable to § 1981. This Court appeared to recognize that danger in a case decided very soon after the Court's decision in *County of Los Angeles v. Davis*. In *Great American Federal Savings and Loan Assn. v. Novotny*, ... U.S. ...., 99 S.Ct. 234, 60 L.Ed.2d 959 (1979) this Court rejected the contention that Title VII rights could be asserted through 42 USC § 1985, noting that if such were permitted "a complainant could avoid most if not all of these detailed and specific provisions of the law . . . the short and precise time limitations of Title VII would be grossly altered. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays a crucial role in the scheme established by Congress in Title VII", *supra* at 966.

II.

Respondents Did Not Violate Title VII by Temporary 8-Month Interim Use of Test.

The Ninth Circuit was correct not finding that an eight-month interim use of an unvalidated test did not violate Title VII.

From the outset it should be noted that there was no broad generalized holding by the Ninth Circuit that a test having an adverse impact did not have to be validated. The petitioners, with lack of precision in referring to a pre-December 1973 test, neglected to state that the test (the use of which both pre- and post-dated the effective date of Title VII) had adverse effect only during a short eight-month period immediately after March, 1972 and that for the entirety of 1973 until replaced in December it was not used with any adverse impact. (R. p. 21)

After Title VII became applicable to public agencies on March 24, 1972, the County of Los Angeles undertook a reexamination of their current written qualification test for deputy sheriff, the study of which was finally completed December of 1973. The only period of time after the effective date of Title VII that the County's test was utilized with adverse impact was a brief interim eight-month period from March 24, 1972 to December of 1972. (R. 21) Under the then existing EEOC guidelines (29 C.F.R. 1607.9) an employer could utilize an existing test, pending a validation study or consideration of alternatives. This short period of use did not constitute a pattern or practice of discrimination under Title VII.[5] *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843 (1977).

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[5]It is also noteworthy that *Griggs v. Duke Power Company* was not decided until March 8, 1971.

The courts below did not render any ruling that changed or affected the validation requirements under Title VII or application of the principles announced in *Griggs v. Duke Power Company*. In refusing to find that Title VII had been violated in this brief period, the courts concluded that the respondents could rely on an interim use of testing devices as indicated in the guidelines, immediately after the effective date of Title VII, while attempting to revise their testing procedures, a task obviously requiring time and study.

In view of the factual context in which the old pre-December test was briefly administered, it is submitted there is no justification for this Court to grant review on a minor issue in the case and on a matter involving no significant factual or legal issues.

III.

The Petitioners' Objections Were Properly Rejected as There Is No One Legal Method of Employment Test Validation; the Validation Study Was Done in Accordance With Professionally Accepted Methods and the Record Does Not Raise the Question Presented.

The Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, stated that "It appears beyond doubt by now there is no single method of appropriately validating employment tests for their relationship to job performance." *Supra*, at 2051, N. 13. In *Washington*, this Court upheld a written test used by the District of Columbia Police Department that was validated in precisely the same manner as by the County herein. In fact, the correlation coefficient is much higher in respondents' study (.60) than in the *Washington* study (.39). *Davis v. Washington*, 512 F.2d 956, 962, N. 38.

Using language that goes directly to the correctness of the Ninth Circuit's ruling in this case, the Court stated:

> "Based on the evidence before him, the district judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and the training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. This conclusion of the District Judge that training-program validation may itself be sufficient is supported by the regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge and by the current views of the Civil Service Commissioners who are parties to the suit. *Nor is the conclusion foreclosed by either Griggs or Albemarle Paper v. Moody, 42 U.S. 405 (1975); and it seems to us a much more sensible construction of the job relatedness requirement.*" (Emphasis added.) 96 S.Ct. 2052-53.

The Ninth Circuit carefully considered all of petitioners' claimed methodological defects and properly rejected the assertion that a validation study following precisely the approved procedure in *Washington v. Davis* was legally defective.[6] The petitioners' contentions on the testing methodology are contrary to federal testing guidelines, applicable case law, and accepted validation techniques. The petitioners cite no case to support their contentions, which upon brief reflection cannot withstand simple common sense analysis. For example, to require as a precondition for legal

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[6]The Ninth Circuit summarized their conclusion as follows:

"The Sheriff's department demonstrated a very high correlation between scores on the ET4-1 test and academic averages at the Academy. Plaintiffs point to no data which are inconsistent with defendants' validation study. Nor do they cite serious flaws in the study's data-gathering or handling which might warrant the suspicion that the obtained correlation is spurious or erroneous." 626 F.2d 665.

validation study that an employer hire individuals who fail their pre-employment test would place an impossible burden on employers, restrict, contrary to the federal testing guidelines, criterion studies to the pure predictive type, and in the context of the examination herein in which 70% passed, would not yield any contrary statistical result.

The petitioners claim that the validation sample was legally defective because it did not include individuals that had failed the test is contrary to the federal testing guidelines. The validation technique utilized by the respondents' experts was a Concurrent Criterion Related Study,[7] that is expressly sanctioned by the guidelines,[8] approved in *Washington v. Davis,* and utilized in almost all modern validation studies for employers.[9]

The fact that almost 70% (69.6%) of all test takers passed and a very high correlation existed between success on the pre-employment test and subsequent academic performance in the training academy, renders petitioners' contentions even more ill taken.

The Ninth Circuit correctly noted:

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[7]A concurrent predictive validity study examines the correlation between pre-employment test performance and subsequent job performance by those employees who took the test and were actually hired. A pure predictive validity study measures the test against all test takers including those that fail to meet the minimum test performance criteria but must necessarily be hired. The petitioners' witness, Kirkpatrick, described a pure predictive study as one where "the test results are not used as a part of the hiring decision. They are simply filed away for research purposes" (R.T. 432, lines 11-20).

[8]Sec. 12(b) of the FEA Guidelines expressly states that "these guidelines do not require a user *to hire* or promote persons for the purpose of making it possible to conduct a criterion related study." (Emphasis added. 28 C.F.R. Sec. 50.14, p. 349.

[9]The method was most recently approved in *Friend v. Leidinger,* 580 F.2d 61 (1978). See District Court findings in *Friend v. Leidinger*, 446 F.Supp. 361, 369 (1977).

> "Under the circumstances here, however, the demonstrated correlation is sufficiently strong to support the inference drawn by the district court after trial that persons excluded from the academy, and thus from the sample, because they failed the ET4-1 entrance exam would not have succeeded in the academic training program. We perceive no reason at this point to require the sheriff's department to hire and train a sample of failing applicants, with the attendant expense to the County and potential unfairness to the candidates so hired, in order to provide statisticians with more certain results." *Craig, et al. v. County of Los Angeles, et al., supra,* at 665 (App. B, p. 12).

The petitioners are not equally wrong in their contention regarding controls for test taking ability. Not only are these unfeasible, they are not required by any guidelines or court decision, and as testified to by the respondents' expert, Dr. Coleman, this was not a significant factor impacting on the validity of the study. (R.T. pp. 379-80). As was the case in *Washington v. Davis,* the respondent's pre-employment test was an aptitude test designed to measure the ability to successfully complete the academic portion of the training program. The academic tests were knowledge tests measuring the recruits' understanding of the subjects taught.

The petitioners misstate the facts in claiming that respondents did not make an analysis of the appropriateness of the pass/fail score. It was testified that the County made such a study and chose a very low cut-off score (only 30% of all applicants failed) to maximize minority passing rates consistent with maintaining test effectiveness. (R.T. 96-97.) The Ninth Circuit's finding on this point is entirely correct.

> "The EEOC guidelines do not require separate validation of passing scores. They do require that the cut-off be 'reasonable and consistent with normal expectations of proficiency within the work force or group

> on which the study was conducted.' 29 C.F.R. § 1607.6 (1975). The sheriff's department complied with this requirement. The evidence indicated that those candidates who barely passed the ET4-1 examination performed correspondingly in the academic classes at the academy. A lower passing score would have resulted in the admission of a number of applicants who would not have been able to perform acceptably in the academy.
>
> "Plaintiffs have presented no evidence indicating that the cut-off score was set arbitrarily. Nor was it so high as to maximize adverse impact on Mexican-Americans." *Craig, et al. v. County of Los Angeles, et al., supra,* at 665 (App. B, p. 12).

The Ninth Circuit holdings on the testing issues were correct and the clear weight of the evidence supported the study as being done in accordance with professionally acceptable methods. It is significant that the petitioners are not claiming that the lower courts' consideration and weighing of the validation evidence was clearly erroneous. Their arguments pertain solely to alleged legal requirements for a validation study and fly clearly in the face of this Court's consistent admonition that there is no single method of appropriately validating employment tests.

Conclusion.

For the reasons stated above, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

DATED: January 20, 1981.

Respectfully submitted,

JOHN H. LARSON,
County Counsel,
By WILLIAM F. STEWART,
Chief Labor Relations Division,
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